IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DONALD F. SHELLHAMMER, Plaintiff,	:	CIVIL ACTION
v.	:	
LaCROSSE FOOTWEAR, INC., Defendant.	:	NO. 99-4909

MEMORANDUM & ORDER

J.M. KELLY, J. **MARCH , 2001**

Presently before the Court is the Motion for Summary Judgment filed by Defendant, Lacrosse Footwear, Inc. ("Lacrosse"). Lacrosse argues that Plaintiff, Donald F. Shellhammer ("Shellhammer"), cannot come forward with sufficient evidence to sustain two elements of his claim, namely that he was an employee of Lacrosse entitled to the protection of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-626 (1994) ("ADEA"), and that he cannot rebut Lacrosse's assertion of a previous settlement agreement as a legitimate basis for its adverse employment decision.

BACKGROUND

Shellhammer was employed as a shoe salesperson by Lacrosse between 1982 and 1992. Lacrosse terminated Shellhammer's employment in 1992. Shellhammer sued Lacrosse, alleging age discrimination. That case was settled in 1993. Terms of the settlement included payments over time to Shellhammer and

Shellhammer's agreement not to apply to work for Lacrosse. The settlement was memorialized with a Settlement Agreement and Release.

In 1993, Shellhammer started a business selling shoes as a manufacturer's representative. In 1994, he started to represent PRO-TRAK Corporation ("PRO-TRAK"), selling the Lake of the Woods product line. Shellhammer received 1099 forms from PRO-TRAK and deducted expenses from gross receipts to determine his profit. Shellhammer also represented other manufacturers between 1994 and 1996.

In 1997, Lacrosse acquired PRO-TRAK, including the Lake of the Woods product line. Lacrosse continued to facilitate sales through PRO-TRAK representation through PRO-TRAK's network of independent sales representatives, including Shellhammer. David Flaschberger ("Flaschberger"), Lacrosse's Vice President of Human Resources, recognized Shellhammer's name at the time of the PRO-TRAK acquisition because Flaschberger was responsible for maintaining the Settlement Agreement. Flaschberger reviewed the Settlement Agreement and was satisfied that Shellhammer's continued representation of the Lake of the Woods line would not violate it. Shellhammer testified that Lacrosse prevented him from representing other shoe lines.

In 1998, Lacrosse eliminated the Lake of the Woods product line and decided to consolidate the Lake of the Woods products

and sales force. Lake of the Woods representatives were allowed to apply for sales positions as employees of Lacrosse. Shellhammer applied for one of the sales positions. Flaschberger told Shellhammer that he would not be considered because of the Settlement Agreement.

STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 56(c), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." This Court is required, in resolving a motion for summary judgment pursuant to Rule 56, to determine whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In making this determination, the evidence of the nonmoving party is to be believed, and the district court must draw all reasonable inferences in the nonmovant's favor. See id. at 255. Furthermore, while the movant bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact, Rule 56(c) requires the entry of summary judgment "after adequate time for discovery and upon

motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

A. Shellhammer's Employment Status

The parties agree that in order for Shellhammer to be covered by the ADEA for his termination, he must have been an employee of Lacrosse. The test of whether Shellhammer was an employee is the agency test set forth in Cox v. Master Lock Co., 815 F. Supp. 844 (E.D. Pa.), aff'd, 14 F.3d 46 (3d Cir. 1993). While several Cox factors suggest that Shellhammer was not a Lacrosse employee, a reasonable jury could find that he was a Lacrosse employee because: (1) Lacrosse never told Shellhammer that he was an independent contractor; (2) Shellhammer never signed an independent contractor agreement; (3) Lacrosse dictated Shellhammer's product lines and sales territory; (4) Lacrosse provided display items and business cards to Shellhammer; and (5) Lacrosse told Shellhammer not to represent the products of other companies. Accordingly, there is sufficient evidence to present to a jury that Shellhammer was an employee of Lacrosse and entitled to the protection of the ADEA.

B. Whether the Settlement Agreement Bars Shellhammer's ADEA Claims

The uncontroverted evidence in this case is that Flaschberger referred to a settlement of a previous ADEA complaint in order to summarily reject Shellhammer's application to become a sales representative for Lacrosse. Whether Shellhammer was a terminated employee or a rejected job seeker, Flaschberger's reference to the Settlement Agreement creates a credibility issue as to whether Lacrosse acted as bound by the Settlement Agreement or in retaliation for a previous ADEA lawsuit. The Court may not resolve this issue on this Motion for Summary Judgment. Anderson, 477 U.S. at 248.

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O R D E R

AND NOW, this 15th day of March, 2001, upon consideration of the Motion for Summary Judgment filed by Defendant, Lacrosse Footwear, Inc. (Doc. No. 14), the Response of Plaintiff, Donald F. Shellhammer and the Reply thereto of Defendant, it is ORDERED that the Motion is DENIED.

BY THE COURT:

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JAMES McGIRR KELLY, J.